

**A Pembinaan Masyuli Sdn Bhd v
Mow Seng Housing & Land Development Sdn Bhd**

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO W-02-117
OF 1995

B SITI NORMA YAAKOB, MAHADEV SHANKAR AND DENIS ONG JJCA
20 NOVEMBER 1997

Civil Procedure — Judgment — Setting aside — Default judgment — Allegation that service of writ and statement of claim was irregular — Whether judgment was thus irregularly obtained and ought to be set aside

C *Civil Procedure — Service — Companies — Service at principal office — Whether service of writ and statement of claim was effected on defendants' principal office — Whether clerk who accepted service and affixed seal on documents was principal officer of the defendants — Rules of the High Court 1980 O 62 r 4(1)*

D The appellants served a writ of summons — although it bore the address of the respondents' registered office in Kuala Lumpur — and the statement of claim at the respondents' sales office in Seremban, Negeri Sembilan. One Lee Peck Ting, the respondents' clerk, accepted service and affixed the seal on the documents on behalf of the respondents. The respondents did not enter any appearance despite having been warned by the appellants' solicitors of the appellants' intention to enter judgment in default. Judgment in default of appearance was subsequently entered against the respondents.

E The respondents then applied to have the judgment set aside on the ground that service of the writ and statement of claim was irregular for non-compliance of O 62 r 4(1) of the Rules of the High Court 1980 ('the RHC') as the writ and statement of claim was not served at their registered office in Kuala Lumpur but at their sales office in Seremban. The deputy registrar set aside the judgment in default and on appeal, this was confirmed by the judge in chambers. On appeal before this court, the respondents argued that the clerk who accepted service does not fall within one of the three categories of officers identified by O 62 r 4(1)(c) of the RHC who can lawfully accept service on their behalf.

G **Held**, allowing the appeal:

H Order 62 r 4(1)(b) of the RHC allows service of process to be effected at any principal office of the respondents if they have more than one. The respondents had held a board meeting at the sales office which reinforces the fact that the premises was another of the respondents' principal office used by them to conduct their business (see p 605A-C).

I The respondents' clerk affixed the respondents' seal on the signed copy of the writ and statement of claim. This suggested that she had the authority to do so. Since a corporation conducts its business through its seal, an endorsement of it is evidence that the corporation

is a willing and interested party in the transaction that it proposes to partake. The respondents' clerk must have had possession of the seal and the authority to use it. Therefore, she had all the trappings of an officer who can conduct the business of the respondents at their sales office in as much as a secretary can. From her conduct, she must have been imbued with the necessary authority to use the respondents' seal as and when such use was required. As such, the respondents' clerk had, by her own conduct, held herself out as one who can be described as a principal officer of the respondents. The judgment in default of appearance had therefore been regularly obtained (see pp 605F-I and 606A).

[Bahasa Malaysia summary]

Perayu-perayu telah menyampaikan satu writ saman — walaupun ia membawa alamat pejabat berdaftar penentang-penentang di Kuala Lumpur — dan pernyataan tuntutan di pejabat jualan penentang-penentang di Seremban, Negeri Sembilan. Seorang yang bernama Lee Peck Ting, kerani penentang-penentang, telah menerima penyampaian dan melekatkan meterai pada dokumen-dokumen bagi pihak penentang-penentang. Penentang-penentang tidak memasukkan apa-apa kehadiran meskipun telah diberi amaran oleh peguamcara perayu-perayu tentang hasrat perayu-perayu untuk memasukkan penghakiman ingkar. Penghakiman ingkar kehadiran kemudiannya dimasukkan terhadap penentang-penentang.

Penentang-penentang kemudiannya memohon supaya penghakiman diketepikan atas alasan bahawa penyampaian writ dan pernyataan tuntutan adalah luar aturan kerana tidak mematuhi A 62 k 4(1) Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') kerana writ dan pernyataan tuntutan tidak disampaikan di pejabat berdaftar mereka di Kuala Lumpur tetapi di pejabat jualan di Seremban. Timbalan pendaftar mengetepikan penghakiman ingkar dan atas rayuan, ini disahkan oleh hakim dalam kamar. Atas rayuan di hadapan mahkamah ini, penentang-penentang berhujah bahawa kerani yang menerima penyampaian tidak diliputi oleh mana-mana tiga kategori pegawai yang diiktiraf oleh A 62 k 4(1)(c) KMT yang boleh menerima penyampaian dengan sah bagi pihak mereka.

Diputuskan, membenarkan rayuan:

Aturan 62 k 4(1)(b) KMT membenarkan penyampaian proses dilakukan di mana-mana pejabat utama penentang-penentang sekiranya mereka mempunyai lebih daripada satu pejabat. Penentang-penentang telah pun mengadakan mesyuarat lembaga di pejabat jualan yang memperkukuhkan hakikat bahawa premis itu merupakan sebuah lagi pejabat utama penentang-penentang yang digunakan oleh mereka bagi menjalankan perniagaan (lihat ms 605A-C).

Kerani penentang-penentang telah melekat meterai penentang-penentang pada salinan writ dan pernyataan yang ditandatangani. Ini mencadangkan bahawa beliau mempunyai kuasa untuk berbuat

- A demikian. Oleh kerana sesebuah perbadanan menjalankan
perniagaannya melalui meterainya, suatu pengindorsan atasnya adalah
bukti bahawa perbadanan tersebut adalah pihak yang rela dan
berminat dalam transaksi yang ia berhasrat menyertai. Kerani
penentang-penentang mestilah mempunyai milikan meterai dan kuasa
B untuk menggunakannya. Dengan itu, beliau mempunyai segala hiasan
seorang pegawai yang boleh menjalankan perniagaan penentang-
penentang di pejabat jualan mereka seperti mana yang boleh dilakukan
oleh seorang setiausaha. Dari kelakuannya, beliau mestilah diberikan
kuasa yang perlu untuk menggunakan meterai penentang-penentang
C apabila penggunaan demikian dikehendaki. Oleh itu, menerusi
perbuatannya kerani penentang-penentang telah menggambarkan
dirinya sebagai orang yang boleh disifatkan sebagai pegawai prinsipal
penentang-penentang. Maka penghakiman ingkar kehadiran telah
diperolehi mengikut aturan (lihat ms 605F-I dan 606A).]

Notes

- D For cases on setting aside judgment, see 2 *Mallal's Digest* (4th Ed,
1994 Reissue) paras 1962–2026 and 2060–2063.
For cases on service on companies, see 2 *Mallal's Digest* (4th Ed,
1994 Reissue) paras 2966–2970.

E Legislation referred to

Rules of the High Court 1980 O 62 r 4(1)(a), (b), (c)

Appeal from: Civil Case No S2–22–176 of 1993 (High Court,
Kuala Lumpur)

- F *Manjit Singh Saini* (Harun Idris Yeoh & Partners) for the appellants.
M Manoharan (Karpal Singh & Co) for the respondent.

Siti Norma Yaakob JCA (delivering the judgment of the court): The
only issue raised in this appeal is whether the appellants (plaintiffs in the
G court below) had adopted the proper procedure when they chose to serve
a copy of their writ of summons and statement of claim on the respondents
personally at the latter's principal place of business and not at their
registered office. This issue arose when the respondents questioned the
validity of a judgment in default of appearance dated 11 June 1993 entered
H against them on the ground that the judgment had been irregularly obtained
by the appellants.

The appellants are contractors and in October 1989, pursuant to an
oral agreement reached with the respondents who are housing developers,
they undertook to construct 172 units of low cost houses, this being the
first phase of the respondents' housing project known as Taman Pelangi
I in Seremban.

On 24 December 1992, the appellants' solicitors demanded payment
of RM145,934.63 from the respondents being progress payments
outstanding after credit was given for a payment made and the 5% retention

sum provided by the respondents. When the respondents failed to meet the demand, the appellants sued them on 20 March 1993 at the High Court in Kuala Lumpur for the sum due. A

Although the writ of summons bears the address of the respondents' registered office in Kuala Lumpur, service of a copy of it and the statement of claim was however effected at the respondents' sales office in Seremban, Negeri Sembilan on 10 April 1993 at 10am. This is not disputed and neither is the fact that one Lee Peck Ting, the respondents' clerk, accepted service of the documents on behalf of the respondents. B

The respondents did not enter any appearance despite being warned by letter dated 27 April 1993 from the appellants' solicitors of the appellants' intention to enter judgment in default, and following the filing of a certificate of non-appearance by the appellants on 11 June 1993, judgment in default of appearance was entered against the respondents the same day. C

Seven months later on 13 January 1994, the respondents applied to have the judgment set aside on the ground that service of the writ and statement of claim was irregular for non-compliance of O 62 r 4(1) of the Rules of the High Court 1980 ('the Rules'). The deputy registrar who heard the application agreed with the respondents and on 7 March 1994, allowed the application and set aside the judgment in default. D

Dissatisfied, the appellants appealed to the judge in chambers and on 9 September 1994, the learned judge dismissed the appeal and confirmed the decision of the deputy registrar. As there is no written judgment, we are in the dark as to what had prompted the learned judge to dismiss the appeal, particularly when he had taken time to consider his judgment. E

The appellants then sought and obtained the leave of this court to argue the matter further and it was under these circumstances that we heard the appeal and allowed it and we now give our reasons for having decided so. F

Order 62 r 4(1)(a), (b) and (c) of the Rules prescribes the three alternatives under which service of a writ can be effected on a local corporation as opposed to a foreign one and in substance, the rule states as follows: G

- (1) Where an action is against a corporation, the writ may be served —
 - (a) by leaving a copy of it at the registered office (if any) of the corporation; or
 - (b) by sending a copy of it by registered post addressed to the corporation at the office, or, if there be more offices than one at the principal office of the corporation, whether such office be situated within Malaysia or elsewhere; or
 - (c) by handing a copy of it to the secretary or to any director or other principal officer of the corporation. H
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In the court below, the respondents objected to the fact that the writ and statement of claim was not served at their registered office in Kuala Lumpur but at their sales office in Seremban.

A We see no basis for such an objection as para (b) of r 4(1) allows service of process to be effected at any principal office of the respondents if they have more than one. In this case, the respondents' registered office, as stated in the writ itself, is at Suite 4.02, Tingkat 4, Bangunan Yayasan Selangor, 55100 Kuala Lumpur. They also maintained another office at
B the material time in Seremban at No 39, Tingkat 1, Jalan Yam Tuan, 70000 Seremban, Negeri Sembilan, this being their sales office in respect of the construction of the low cost houses that they had undertaken for the appellants. There is an admission by one of the respondents' directors in an affidavit affirmed on 12 January 1994 that at 3pm on 10 April 1993 (the same afternoon the writ and statement of claim was served), the respondents
C held a board meeting at the premises attended by a representative of the appellants to discuss the amount due to the appellants. The fact that such a board meeting was held at the sales office reinforces our finding that the premises was another of the respondents' principal office used by them to conduct their business.

D Before us, that issue was not touched by the respondents as they confined their arguments to the fact that Lee Peck Ting, who accepted service, does not fall within one of the three categories of officers identified by para (c) of r 4(1) who can lawfully accept service on their behalf.

E As Lee Peck Ting was not a secretary or a director of the respondents, the issue raised was whether she can, as a clerk, be described as a principal officer of the respondents to qualify her to accept service on behalf of the respondents. We say she can for the following reason.

In her affidavit affirmed on 19 February 1994, she had admitted that she had received a copy of the writ and statement of claim and had signed at the back of it. That signed copy as exhibited shows her signature
F immediately after the endorsement of the respondents' seal. Although she made no mention in her affidavit who had affixed the respondents' seal, we have no doubt she had done so. This presupposes that she had the authority to do so and there is no averment from any of the respondents' directors who had affirmed affidavits to the contrary. Since a corporation
G conducts its business through its seal, an endorsement of it is evidence that the corporation is a willing and interested party in the transaction that it proposes to partake. Lee Peck Ting must have had possession of the respondents' seal and with it the authority to use it. That must be the only explanation as to her conduct in affixing the seal. Under such circumstances, we considered that she had all the trappings of an officer who can conduct
H the business of the respondents at their sales office in as much as a secretary can and from her conduct, she must have been imbued with the necessary authority to use the respondents' seal as and when such use was required. That use presented itself when she was served with the appellants' writ and statement of claim. Under these circumstances, the respondents
I cannot now disclaim any responsibility for the use of their seal on the ground that a clerk cannot be equated as a principal officer. On the facts of this appeal, we consider that Lee Peck Ting who was only a clerk, had by her own conduct, held herself out as one who can be described as a principal officer of the respondents.

Since there were no issues raised as to whether the respondents had any defence on the merits, we had for the reasons that we had given made a finding that the judgment in default of appearance dated 11 June 1993 had been regularly obtained. In allowing the appeal, we also ordered that the respondents bear the costs of this appeal as well as the costs in the court below and lastly, the deposit made by the appellants be refunded to them.

Appeal allowed.

Reported by David Lai

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